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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY JONES,

Defendant and Appellant.

A123985

(Contra Costa County
Super. Ct. No. 050805424)

Michael Anthony Jones appeals his conviction following a court trial of two counts of identity theft (Pen. Code § 530.5)¹ and two counts of second degree burglary (§§ 459, 460, subd. (b)). His sole contention on appeal is that the trial court should have stayed the sentences on the two burglary counts pursuant to section 654. We affirm.

FACTUAL BACKGROUND

On February 13, 2006, defendant applied by telephone for a loan from American General Services (American General). He used a social security number that belonged to a Michael *Allen* Jones. Defendant later entered the local branch of American General to sign the loan application, close the loan and obtain the funds. He signed the application in several places verifying the information was true and accurate, even though it included a social security number that did not belong to him. American General loaned defendant \$5,000, and he defaulted on the loan.

A little over a year later, on April 6, 2007, defendant went to a local office of Citi Financial. He stated he was interested in obtaining a loan and took a business card from

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Luis Espinoza. Defendant called Espinoza later that day, said he wanted to process a loan application, and provided Espinoza with a variety of information, including the social security number belonging to Michael Allen Jones. When Espinoza entered the social security number, the system alerted him a previous application with the same social security number had been denied. Espinoza asked defendant if he wanted to renew that application. Defendant said he did, and he confirmed the information contained in the prior application, which included the Michael Allen Jones social security number. Defendant told Espinoza only his employer had changed. Espinoza submitted the loan application for approval and told defendant to come in on April 9, 2006, with identification and a pay stub.

On April 9, 2007, defendant went to the Citi Financial branch office to close the loan and obtain the proceeds. In the course of verifying the information on the application, the branch manager, Maria Udave, discovered a fraud alert on the social security number defendant had provided. She called the number listed in the fraud alert, and said: “Mr. Michael Anthony Jones, just want to verify that you did submit an application with us, and that you are here in the office to receive your loan closing.” The recipient of the call informed Udave he had *not* applied to Citi Financial for a loan and said his name was Michael *Allen* Jones, not Michael Anthony Jones. Udave notified the police, and they arrested defendant.

Michel Allen Jones testified the social security number on the American General application belonged to him, and he had never applied to American General for a loan. He discovered the loan when he reviewed his credit report, and he reported the fraud to American General and to the police. He similarly testified the social security number on the Citi Financial loan documents belonged to him, and he had not applied to Citi Financial for a loan, either. He had never given anyone else permission to use his social security number.

Defendant acknowledged he signed loan documents with an incorrect social security number, but claimed not to have provided that incorrect information when he applied by telephone. He suggested American General and Citi Financial both made

errors and testified he did not notice the errors when he later verified the loan applications in person and obtained or attempted to obtain the funds. He also admitted a prior conviction in 1991 for an offense involving the use of Michael Allen Jones' social security number.

The court did not credit defendant's testimony that he had not provided false information to American General or Citi Financial and had not noticed the purported error when he later entered the branch offices of each institution and signed the loan documents. The court found defendant guilty as charged in the information of two counts of identity theft and two counts of burglary.

The court sentenced defendant to the mitigated term of 16 months on count 1, the identity theft based upon the use of Michael Allen Jones' personal information in an attempt to obtain a loan from Citi Financial. It imposed a concurrent term on count 2, the burglary alleged to have occurred when defendant entered Citi Financial with intent to commit larceny. It also imposed concurrent terms of 16 months on counts 3 and 4, the identity theft based upon use of Michael Allen Jones' personal information to apply for a loan from American General and the burglary alleged to have occurred when defendant later entered American General with intent to commit larceny.

DISCUSSION

Defendant contends the trial court should have stayed the sentences imposed on the two burglary counts pursuant to section 654 because he had the same intent and objective with respect to each identity theft and related burglary, i.e., to obtain funds using identifying information belonging to Michael Allen Jones. As we explain below, defendant's argument is unavailing because the record supports the court's implicit finding that each identity theft and subsequent burglary was based upon a divisible course of conduct.

Section 654 precludes multiple punishments for a single act or a course of conduct indivisible in time and character. (*People v. Ramirez* (2006) 39 Cal.4th 398, 478.) "Although section 654 literally applies only where multiple statutory violations arise out of a single 'act or omission,' it has also long been applied to cases where a 'course of

conduct' violates several statutes. [Citations.] A 'course of conduct' may be considered a single act within the meaning of section 654 and therefore be punishable only once, or it may constitute a 'divisible transaction' which may be punished under more than one statute. [Citations.] . . . [¶] . . . 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252-1253.)

However, a finding that multiple offenses were aimed toward one objective does not necessarily mean the offenses constitute one indivisible course of conduct for purposes of section 654. "This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

The determination of defendant's intent and objective, and whether his course of conduct was indivisible within the meaning of section 654, is a question of fact. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640 (*Andra*).) Where, as here, the trial court does not expressly find divisible criminal acts, such a determination is implied and must be upheld if supported by substantial evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

Defendant's argument that each identity theft is indivisible from the related burglary is based, in part, upon the incorrect factual premise that the identity theft and related burglary were based upon the same act, i.e., entering the local branch of American General or Citi Financial to close the loan. Yet, substantial evidence supports the court's contrary implicit finding that each identity theft offense *preceded* the commission of the related burglary. "In order to violate section 530.5, subdivision (a), [identity theft] a defendant must both (1) obtain personal identifying information, and (2) use that information for an unlawful purpose. [Citation.] Thus, it is the *use* of the identifying

information for an unlawful purpose that completes the crime and each separate use constitutes a new crime.” (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 455, italics added.) Each identity theft offense charged here was complete when defendant made the telephone calls to the American General and Citi Financial loan officers and provided Michal Allen Jones’ social security number, without his consent, to apply for the loans.

Each burglary, in turn, was based upon defendant’s subsequent acts of unlawfully entering the local branches of the lending institutions with the intent to commit larceny by closing the loans and obtaining the funds. (See *People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1043.) Although, with respect to American General, the identity theft and subsequent burglary apparently occurred on the same day, it is reasonably inferred that after ending the telephone call, gathering the documentation and traveling to the branch, defendant had time to reflect and reconsider whether to enter the branch, sign the documents and actually obtain the funds. (See *People v. Gaio, supra*, 81 Cal.App.4th at p. 935.) As for the transaction involving Citi Financial, the identity theft committed during the telephone call preceded the entry into the branch office by several days, thereby providing ample opportunity to reflect and decide to stop, or to commit another offense. (*Ibid.*)

Furthermore, the victims of the identity theft and burglary offenses were different. (See *Andra, supra*, 156 Cal.App.4th at p. 640.) Michael Allen Jones was the victim of the identity thefts. American General and Citi Financial were the victims of the burglaries.

The facts in this case are strikingly similar to those in *Andra, supra*, 156 Cal.App.4th 638, in which the Court of Appeal held no stay pursuant to section 654 was required. In *Andra*, the defendant used the victim’s personal information to obtain a credit card, and then used the credit card to rent a car she never returned. She also used the same victim’s personal information to open a bank account, and then deposited bad checks and withdrew funds, committing theft by false pretenses. The defendant argued all of the offenses were committed pursuant to a single intent and objective to use the

false personal information to obtain goods, i.e., the vehicle, and access funds from fraudulent or stolen checks deposited in the account. (*Andra*, at pp. 641-642.)

The court rejected her argument, explaining criminal acts are divisible “ ‘where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]’ [Citation.] ” (*Andra, supra*, 156 Cal.App.4th at p. 640.) The defendant had ample opportunity to reflect and renew her criminal intent as to each of the crimes. Identity theft occurred when she used the victim’s personal identifying information, without consent, to obtain a credit card. The vehicle theft occurred two weeks later, when she used the credit to rent a vehicle and failed to return it. (*Id.* at p. 641.) Identity theft occurred again when she used the victim’s identifying information to open the bank account. Theft by false pretenses occurred when she used the account to deposit bad checks and withdraw funds. (*Id.* at pp. 641-642.) Moreover, there were multiple victims. The victim of the identity theft was the person whose personal information defendant used, whereas the victim of the vehicle theft was the car rental agency and the victim of the theft by false pretenses was the bank. (*Ibid.*) Accordingly, the court held the defendant was properly punished for both identity thefts, the vehicle theft, and obtaining money by false pretenses because “the temporal separation between these crimes, [gave her] substantial opportunity to ‘reflect’ on her conduct and then ‘renew’ her intent to commit yet another crime. [Citation.] She chose, repeatedly, to continue on in her crime spree.” (*Ibid.*)

Similarly, here, each identity theft offense was complete when defendant, by phone, provided Michal Allen Jones’ social security number to support a loan application, first from American General and second, from Citi Financial. The burglaries occurred later, when, despite having had an opportunity to stop and reflect, defendant nonetheless proceeded to enter branches of American General and Citi Financial to close the loans and obtain the proceeds. In doing so, he committed new offenses involving

different victims. We therefore reject defendant's assertion that the identity theft and burglary charges were indivisible and separate punishment was impermissible.

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Marchiano, P. J.

Margulies, J.